SUPREME COURT, U. S.
APR 2 1969
CLERK

No. 1015

IN THE

Supreme Court of the United States

WILLIAM C. WITHERSPOON,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS,
Sheriff of Cook County, Illinois,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

(1)

The Decision of the Court of Appeals for The Fourth Circuit In Crawford v. Bounds Is Directly In Point and Correctly Decides the Issues Presented In This Cause.

On Thursday, April 11, 1968, after the filing of the briefs of both petitioner and respondent in this case, the United States Court of Appeals for the Fourth Circuit, sitting *en banc,* rendered its decision in *Crawford* v. *Bounds,* No. 10,981. That case, like the case at bar, arose on collateral attack of a state murder conviction and death sentence and involved issues identical to those presented by this case.

There, as here, petitioner charged that the exclusion for cause of jurors who expressed scruples against the death penalty violated his constitutional rights under the Sixth and Fourteenth Amendments. The Fourth Circuit reversed the denial of the petition for habeas corpus and remanded with instructions to issue the writ if the state fails to grant the petitioner a new trial, specifically holding (Op. pp. 22-23, App. A. p. 20)*:

> "... that belief against capital punishment on the part of jurors who are vested with a dichotomy of functions—the determination of the issue of guilt, and, if guilt is found, the degree of punishment to be imposed—cannot be allowed to disqualify a substantial part of the venire when it is not established that the views of the persons so disqualified will preclude them from making a fair determination on the issue of guilt, aside from the issue of punishment. Such disqualification prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws."

The decision in *Crawford* is so precisely in point and the majority opinion is so incisive in its reasoning that appellant has printed the full opinion as Appendix A to this brief.* It is appropriate, however, to summarize the

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* "Op." refers to the published slip opinion in *Crawford*. "App. A." refers to the Appendix to this reply brief which reproduces the *Crawford* opinion.

* All of the seven judges who participated concurred in the reversal. Of the seven, four concurred in the majority opinion of Judge Winter. Among them, Judge Sobeloff and Judge Craven wrote additional concurring opinions, Judge Sobeloff expressing his belief that the opinion should be grounded on due process as well as equal protection, and Judge Craven indicating he would

Court's analysis of a few of the major issues and arguments which have been presented in the instant case.

(a)

The crucial findings of fact which led the Court to its decision in *Crawford* were (i) jurors were excluded from the petitioner's jury, for "cause," solely because they expressed scruples against or opposition to the death penalty, without inquiry as to whether the scruple expressed would prevent the juror from being impartial *on the issue of innocence or guilt;* and (ii) the result of permitting the challenge for cause on this broad basis was to systematically exclude from the jury which would decide the guilt issue a substantial segment of the community.

With respect to the failure of the *voir dire* to establish that the disqualified jurors would not be impartial on the issue of guilt or innocence, the Court observed (Op. p. 6, App. A. pp. 5-6):

> "It is undisputed that members of the panel, from which the jury that convicted petitioner was chosen, were interrogated as to whether they had any sentiment or reservation against capital punishment; and any who expressed any such sentiment or reservation were, at the request of the prosecutor, immediately excused for cause without further inquiry. Thirty-four of seventy-five prospective jurors were disqualified on this broad ground. None of these thirty-four

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find a denial of the defendant's constitutional rights in the elimination of scrupled jurors even from the penalty fixing phase of a capital trial. The remaining three judges found it unnecessary to reach the constitutional issues discussed in the opinions of Judges Winter and Sobeloff; and one of them, Judge Bryant, indicated that he would disagree with the majority if he reached those issues.

was asked whether his scruples against capital punishment would interfere in any way in the determination of petitioner's guilt or innocence."

Virtually identical facts are present in the case at bar. Not a single prospective juror was questioned as to whether his or her opposition to the death penalty would affect his ability to be impartial on the innocence-guilt issue.

Basing its decision on the failure to establish a connection between the venireman's views on punishment and his fairness on the issue of innocence-guilt, the Court in *Crawford* found it unnecessary to reach the further question, raised in this case, of whether the inquiries on *voir dire* were sufficient to show that the views on capital punishment would prevent a fair consideration of the death penalty during the penalty fixing phase of the trial. As demonstrated in petitioner's opening brief and discussed in Part (5) of this reply brief, with but a few exceptions the *voir dire* in the case at bar was insufficient to establish that the veniremen would be unfair on the *penalty* question. Thus, on this aspect of the facts, the instant case is *a fortiori* from the *Crawford* case.

With respect to the substantiality of the exclusion resulting from the broad challenge allowed, the Court in *Crawford* observed that 45.33% of the panel was eliminated because of conscientious scruples against capital punishment, and noted that this percentage was "startlingly" close to the results of the 1966 Gallup Poll, which showed that 47% of those interviewed were opposed to capital punishment. (Op. pp. 6-7, fn. 4, p. 7; App. A. p. 6.) In the instant case, 49% of the jurors were excused for cause because of conscientious scruples against or opposition to capital punishment, without inquiring as to what effect, if any, their scruples would have on their ability to decide the guilt-innocence issue.

Thus, on both of the crucial issues of fact which form the basis for the *Crawford* decision, the record here is even stronger than the *Crawford* record.

(b)

The Court in *Crawford* fully recognized that in North Carolina, a long line of cases approved the exclusionary practice under attack, and that several federal cases likewise have directly or inferentially rejected petitioner's contentions. Every significant case in this area is cited and carefully analyzed in the *Crawford* opinion. Thus, to the extent applicable, the Court in *Crawford* considered and rejected virtually every case cited by respondents in the case at bar. The Court's analysis is contained on pages 8-9 and 15-21 of the memorandum opinion. (App. A., pp. 12 to 17.)

(c)

The Court in *Crawford* carefully considered and specifically rejected the assumption upon which respondents heavily rely in the instant case, to wit, that the exclusion of a prospective juror because of his scruples against the death penalty is reasonable where the crime could be punished by a range of penalties including death, because such scruples necessarily create the inference that the juror would not be impartial on the question of guilt or innocence. See *United States* v. *Puff*, 211 F.2d 171 (2nd Cir. 1954), cert. denied 347 U.S. 963. After discussing the *Puff* rationale at length (Op. pp. 15-19, App. A., pp. 12 to 17) the Court said (Op. p. 19, App. A. pp. 16-17):

> ". . . in *Puff* there was not recognition that what constitutes partiality of a juror on the issue of punishment does not necessarily constitute partiality of a juror on the issue of guilt, and *Puff* was not de-

cided on a record which developed the substantial systematic exclusion which, by virtue of prevailing community sentiment, inevitably results when jurors, disqualified as to the issue of punishment, are considered to be disqualified automatically as to the issue of guilt. *Puff* established the rule that when a sentencing procedure requires a jury to assess guilt and fix punishment in a single simultaneous verdict, necessarily, a juror, having bias as to punishment, is biased as to guilt. This thesis we reject; and as we later note, even if jury sentencing is established, there are alternatives to the single verdict system when the result thereof is to deny a constitutional right."

(d)

The Court in *Crawford* specifically considered and rejected the further argument that the wholesale and systematic exclusion of scrupled veniremen even though they constitute a substantial portion of the venire does not abridge the constitutional right to trial by a jury composed of a fair cross-section of the community because there is no showing that the "class" excluded would act as a class or have any identifiable common characteristics other than their views on the death penalty. This argument too is heavily relied upon by respondents in the instant case. In rejecting this argument, the Court of Appeals cites the cases in which this Court has condemned the systematic exclusion of a class of jurors, regardless of any showing of specific prejudice or identifiable common characteristics which would affect their impartiality, and applies the rationale of those opinions to the facts of the *Crawford* case and the case at bar.* The Court said (Op. pp. 27-29, App. A. pp. 24 to 27):

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* *Glasser* v. *United States,* 315 U.S. 60 (1942); *Ballard* v. *United States,* 329 U.S. 187 (1946); *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217 (1946).

"North Carolina's practice of excluding persons from the jury selected to determine an accused's guilt or innocence, merely because they have some sentiment or reservation against capital punishment, without any determination that their beliefs would affect their ability to decide the issue of culpability, cannot stand under these Supreme Court decisions condemning systematic exclusion. . . . in the instant case 45.33% of the prospective jurors were disqualified on this ground. We do not know the color, or the sex, or the economic status of those who would be disqualified, or those remaining who would be considered qualified. We do not, and need not, know that in determining guilt or innocence they would act as a class. *Ballard* v. *United States, supra.* We know only that such a substantial percentage of the populace generally is different from the remaining populace in having a different basic concept of punishment in even the most heinous crimes which may stem, as pointed out in *Turberville* v. *United States, supra,* from divers and diverse reasons, from unshakable religious convictions to intellectual or philosophical distaste. Such a group would comprise a variety of views and a variety of approaches and, if allowed to serve, may well have a 'subtle interplay of influence' upon the others. *Ballard* v. *United States, supra,* p. 194. As a group it would seem as readily identifiable as the wage earners in *Thiel* v. *Southern Pacific Co., supra.*

• • •

". . . the *voir dire* inquiry should not cease after a determination that the prospective juror is opposed to capital punishment, but should further ascertain whether this opposition would preclude him from making a fair determination on the issue of guilt.

• • •

". . . if a prospective juror with conscientious objections can, in spite of these objections, make an impartial determination on the issue of guilt, his exclusion, if the class to which he belongs become sub-

> stantial, works to deny to the defendant his right to have his case judged by a jury representative of the community without serving any recognizable, legitimate interest of the state. . . . Under the equal protection clause, *voir dire* cannot be a blunt instrument of systematic exclusion of a widespread segment of the community whose views do not interfere with the interest which the state seeks to protect.''

In grounding its decision on the inherent denial of equal protection which results from the systematic and arbitrary exclusion of a substantial class of people from the jury, the majority in *Crawford* found it unnecessary to consider the further questions, which are raised here, of whether the exclusion of scrupled jurors operates to exclude disproportionate numbers of persons in certain other readily identifiable classes, such as Negroes, women, etc. (petitioner's opening brief pp. 17 to 20), or operates to leave an eligible venire which is partial to the prosecution on the issue of guilt or innocence (petitioner's opening brief, pp. 28 to 33). Judge Sobeloff, in his separate concurring opinion, discusses these additional issues, and on the basis of the scientific surveys cited in petitioner's opening brief adopts the position urged by petitioner here on these additional issues. (Sobeloff, J., Concurring Op. pp. 3-4, App. A. pp. 32 to 34).

(e)

The Court in *Crawford,* by condemning the practice of excluding scrupled jurors, without inquiring into the effect of their scruples on the innocence-guilt issue, avoids any possible claim that this case is not ripe for decision or that the scientific surveys presented are inadequate to support petitioner's arguments. Even amicus Legal Defense Fund

concedes that the limited issue decided in *Crawford* is ripe for decision in the case at bar.* (Brief p. 52.)

(f)

The Court expressly considers and rejects the proposition so vehemently urged by the respondents here, particularly the Sheriff, that the systematic exclusion of a substantial class of prospective jurors is somehow justified because the state has a legal right to impose death as one of the possible penalties for crime, and because under the single trial-double issue procedure adopted in Illinois (and North Carolina) the inclusion of scrupled jurors in capital cases may, as a practical matter, cut down the number of death penalties imposed or results in hung juries. Fully recognizing, for the sake of argument, both the alleged right to "have" a death penalty and the possible effect of the inclusion of scrupled jurors in capital cases under the dual issue trial system, the Court forcefully demonstrates that the existence of such a state created dilemma cannot excuse or justify the systematic exclusion of a substantial class of jurors on the guilt or innocence issue (Op. pp. 30-31, App. A pp. 28-29):

> "It is clear that the real interest which the state is seeking to protect by the *voir dire* practice followed in the instant case is the preservation of capital punishment, as one possible punishment, though not exclusive. This interest provides no firmer justification for the systematic exclusion of a substantial portion of the community from a jury determining the defen-

* The Court in *Crawford* also incisively answers any claims which might be made that the petitioner there, or here, would lack standing to complain of the exclusion of scrupled jurors in the absence of any showing that he was a member of the excluded class. See Opinion, p. 27a, App. A. pp. 24-25.

dant's guilt or innocence. Again, we do not question the legitimacy of this interest, and we do not doubt that permitting persons with conscientious objections to capital punishment to sit on a jury which is both to determine the guilt or innocence of the defendant and to impose his punishment in a capital case may result in some cases in effective nullification of the death penalty. . . . But, the state has *no* constitutional right to the imposition of capital punishment in any case; and a defendant *has* a constitutional protection against systematic exclusion. Moreover, the state's non-constitutional interest can be served by more narrow measures than the systematic exclusion of a large segment of the community from serving on a jury which is to determine the guilt or innocence of the defendant, and thus such exclusion cannot be deemed necessary to effectuate a valid state interest so as to save it under the equal protection clause." (Emphasis the Court's.)

(g)

The majority in *Crawford* found, implicitly in the primary opinion and expressly in the concurring opinion of Judge Sobeloff, that the systematic exclusion of scrupled jurors, where they represent a substantial portion of the venire and where no connection is shown between their views on the death penalty and their impartiality on the issue of guilt or innocence, is a constitutional defect which goes to the heart of the fact-finding process. Thus, the Court infers, if it does not hold, that its decision should be applied retroactively. As expressed by Judge Sobeloff, (Concurring Op. p. 2, App. A p. 32):

"'. . . These exclusions go to 'the very integrity of the fact-finding process' which depends on the presence of an impartial jury truly representative of a cross-section of the community. . . .'"

The inter quotation in Judge Sobeloff's opinion is from this Court's decision on retroactivity in *Linkletter* v. *Walker,* 381 U.S. 618-639 (1965). See the discussion in Part (14) below.

In conclusion, the decision in *Crawford* is directly in point with this case, both on its facts and its legal issues, and the opinion of the Court in that case incisively answers the arguments of respondent here. We respectfully submit that this Court should adopt the views expressed by the Fourth Circuit Court of Appeals in *Crawford.*

(2)

This Court's Recent Decision In United States v. Jackson Affords Additional Support To Petitioner's Contentions.

On April 8, 1968, this Court announced its decision in *United States* v. *Jackson,* 36 Law Week 4277. A majority of the Court held unconstitutional the provision of the Federal Kidnapping Act (18 U.S.C. §1201(a)) which provides that persons tried under that Act could be given the death penalty if but only if "the verdict of the jury shall so recommend." This Court affirmed the District Court's holding that this provision "makes 'the risk of death' the price for asserting the right to jury trial, and thereby 'impairs . . . free exercise of that constitutional right.'" (36 L.W. at 4278.) This Court said (36 L.W. at 4280-81):

> ". . . The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. [The provision] chill[s] the assertion of constitutional rights by penalizing those who assert them. . . ."

The very same kind of chilling effect on the exercise of constitutional rights was created through the operation

of Section 743 of the Illinois Criminal Code. That statute discouraged defendants indicted for murder from exercising their right to jury trial, because through the exclusion for cause procedure embodied in Section 743, the trial jury was stripped of all persons having "conscientious scruples against capital punishment, or [who were] opposed to the same." Cognizant of this statute and its effect upon the composition of the trial jury which ruled irrevocably on guilt or innocence and on the penalty, defendants would naturally be encouraged to have their cases heard at a bench trial—there was (and is) no authority to disqualify scrupled judges. When a jury trial was demanded, the defendant's fate on all issues was adjudged by a jury from which a substantial segment of the community had been excluded, leaving those who were biased in favor of the prosecution on the issue of defendant's innocence or guilt, and who would have no hesitation in voting to inflict the ultimate penalty in in the event of a finding of guilty.

Thus, Section 743 is invalid under the principles announced in *Jackson* as well as for the other reasons heretofore urged by petitioner.

(3)

Respondents Have Failed To Consider the Validity of Section 743 As Written.

It is significant that respondents have made no effort to discuss or support Section 743 as written. Here, as in a number of recent cases decided by this Court, fundamental constitutional rights may not be subjected to the threat of violation by vague and overbroad statutes, regardless of limiting interpretations.*

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* Cf. *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Winters* v. *New York,* 333 U.S. 507 (1948); *Wright* v. *Georgia,* 373 U.S. 284 (1963).

But there are no limiting interpretations of Section 743. That statute does not require any showing that the venireman's conscientious scruples against or opposition to capital punishment will or might have any effect whatever on his verdict. To put Section 743 into operation, it need only be shown that the venireman has scruples against or is opposed to capital punishment. Respondents and the Attorney General of California have not seen fit to comment upon this uncontrovertible language and effect of the statute here under consideration.

Because of its broad and unspecific contours, Section 743 sanctions and invites challenges for cause where in fact no cause or bias exists, and for this reason, as written as well as applied, it violates the Constitution.

(4)

The Voir Dire Examination of Mr. Salazar Did Not Avoid the Constitutiona' Violations Arising From the Wholesale and Systematic Disqualification Of Jurors At Petitioner's Trial.

The respondents rely heavily upon the proposition that the *voir dire* questioning of the first juror, Mr. Salazar, was extensive, and conclusively established that he would not vote for a death penalty in any case. From this, the respondent proceeds to argue that the questioning of Mr. Salazar was sufficient to avoid any constitutional error in excusing him for cause; that the other jurors must have heard the questioning of Mr. Salazar; and that somehow this cures any inadequacy in the questioning of the other jurors. (St. Atty. pp. 16-17; A.G. Ill. pp. 13-15.)

The respondent's argument in this regard is wholly specious for several reasons.

(a)

The questioning of Mr. Salazar was itself insufficient in light of the Crawford *decision.*

The respondent correctly asserts that the *voir dire* examination of Mr. Salazar established that he would not return a death verdict. But not even Mr. Salazar was questioned on whether his scruples would affect his ability to render an impartial verdict *on the question of guilt or innocence,* apart from the penalty issue. Thus even the examination of Mr. Salazar on which the respondent relies was inadequate to meet the constitutional requirements established in *Crawford.*

(b)

The explanation made to Mr. Salazar was not heard by all the veniremen, and was probably heard by very few.

It is contended that the trial court's explanations to Mr. Salazar was heard by others seated in the courtroom. (A.G. Ill. pp. 13-14; St. Atty. pp. 15-16.) The question is academic and the assertion *dehors* the record, but it should be pointed out that the two separate groups of veniremen who were later brought into the courtroom (R. 731, 843) obviously did not hear what was said to Mr. Salazar.

It is highly doubtful that even those present in the courtroom, particularly veniremen seated in the rear, heard what was said to Mr. Salazar. Acoustics in the large courtrooms in the Criminal Court of Cook County are extremely poor, and it is particularly difficult to hear during the spring and summer months (petitioner's case was tried in April, 1960) when the windows are opened for ventilation. Thus, as the prosecutor told Mr. Salazar,

"there are railroad trains and airplanes and other types of sounds which tend to merge in with your voice and, although we know you're saying something, it's difficult to hear what you are saying." (R. 636.)*

(c).

Even assuming the voir dire of Mr. Salazar was adequate and was heard by the other veniremen, the proper examination of one venireman does not justify the improper excuse for cause of others.

Respondent's argument that the allegedly proper excuse of one venireman cures the improper excuse of over forty others is unsupported by logic or authority. The fact that Mr. Salazar stated in response to questions by the court that his conscientious scruples would prevent his returning a death verdict by no means assures that the next juror who felt a "conscientious scruple" would have responded in the same way to similar questions even if he heard the Salazar *voir dire*.

Indeed, later colloquy with veniremen shows there was no clear understanding of the customary short-hand inquiry. For example, we call the Court's attention to the examination of Mrs. Jedinak, in which she first answered the "conscientious scruple" question "yes," and then following an explanation said "no." She was excused when, in apparent confusion, she said she didn't want to be responsible for deciding someone should be put to death, "I mean, my conscience." (Petitioner's Brief, App. 1, pp. 35-36.)

* The building is bounded on the north by railroad tracks and on the east by a busy thoroughfare, California Avenue, and a large International Harvester plant is located just to the east of California Avenue.

(5)

Without Explicit Inquiry As To the Effect On the Penalty Issue, There Is No Rational Basis For Excluding Scrupled Persons.

It is contended that persons who have conscientious scruples against imposition of the death penalty will of necessity refuse to sign a death verdict, or will be incapable of fairly deciding the question of penalty, hence it is sufficient to ascertain that the scruples exist without further probing. (A.G. Ill. 15; St. Atty. pp. 14-15; A.G. Calif. p. 15.)

The scientific studies before the Court, as well as common experience, show this argument to be fallacious. Conscientious scruples are not commonly regarded as precluding action. Rather, they give rise to hesitation or reflection. At best the phrase is open to the venireman's free interpretation. Thus, Professor Goldberg reports that many scrupled jurors will vote to impose the death penalty when presented with the facts of particular cases. (Petitioner's opening brief, App. 4.) Without further inquiry, there is no justification for concluding that scrupled persons cannot be fair to the state on the penalty issue.*

The Constitution prohibits the mass exclusion of this sober, reflective segment of the community from criminal juries.

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* It is *a fortiori* unjustified to conclude that penalty-scrupled persons cannot be fair to the state on the innocence-guilt issue. See Part (10) below.

(6)

Hoyt v. Florida Is Not In Point.

Respondents place great reliance on *Hoyt* v. *Florida*, 368 U.S. 57 (1961). (A.G. Ill. pp. 32-33; St. Atty. pp. 23-25.) The statute involved in *Hoyt*, unlike Section 743, prohibited calling for jury service any woman who had not registered for jury duty. Thus, women could avoid jury duty at will. The case did not involve purposeful exclusion of qualified persons. Rather, the Florida statute conferred upon women an exemption from jury service, which this Court upheld in the light of women's special status in their homes and the good faith operation of the statute.

In contrast, the case at bar involves a systematic, purposeful and irrational exclusion by the state of a substantial segment of those called and qualified for jury duty. Through the operation of Section 743, scrupled persons who were willing to serve as jurors were absolutely excluded from jury service in murder cases regardless of their ability to be fair to the state on the innocence-guilt and penalty issues.

(7)

Petitioner Does Not Have To Establish That His Jury Was Unfair.

Respondents emphasize that petitioner has not shown that the jury which tried his case was actually unfair or biased against him. (A.G. Ill. pp. 28-31, 35; St. Atty. p. 28.) The State's Attorney asserts that petitioner "has the burden of showing that the jury that tried him was unfair. *Beck* v. *Washington*, 369 U.S. 541, 558 (1962)."

The *Beck* case involved a claim that the jury was tainted by adverse publicity, and is clearly not in point here.

If an unlawful exclusion from jury service is established, this Court has not required proof that the exclusion resulted in prejudice. (Petitioner's opening brief, p. 28.) Thus, as Judge Sobeloff said in *Crawford* (Concurring Op. p. 4, App. A p. 33):

> ". . . it is unnecessary to speculate as to the effect this particular group might have if permitted to participate. *Ballard* v. *United States,* 329 U.S. 187 (1946)."

Compare *In re Murchison,* 349 U.S. 133 (1955), discussed in Part (17) below.

(8)

Scrupled Persons Constitute An Identifiable Class Whose Exclusion From Jury Service Is Proscribed.

Respondents argue that exclusion of scrupled persons is not unlawful because they are not an "identifiable group." (A.G. Ill. pp. 26-31; St. Atty. pp. 22-24.) To the contrary, scrupled persons are readily identifiable by the very fact of their scruples, as shown by the record in this case as well as the records in the *Bumper, Madden* and *Turner* cases. It is not necessary to be able to identify an excluded group by sight (e.g., women, Negroes). This Court has held that the arbitrary and systematic exclusion of any group is unlawful, such as daily wage earners. *Thiel* v. *So. Pacific Co.,* 328 U.S. 217 (1946). Other courts have invalidated exclusion based on religious beliefs. *Schowgurow* v. *State,* 240 Md. 121, 213 A.2d 475 (1965); *Juarez* v. *State,* 102 Tex. Crim. 297, 277 S.W. 1091 (1925). It would be equally unconstitutional to exclude all members of a political party, or all of those who have any view, belief or leaning which is irrelevant to their ability to serve fairly as jurors in the case on trial.

This argument was made by the state and rejected in *Crawford* v. *Bounds,* discussed above in Part (1), page 7, (Op. pp. 27-28, App. A 26).

(9)

The Percentage or Number of Venireman Excluded Only Serves To Aggravate the Constitutional Violation.

The Illinois Attorney General attributes to petitioner the argument "that a prejudice is entitled to be represented on the jury when it is prevalent enough . . ." (Brief, p. 35.) Petitioner's position is not dependent upon the widespread prevalence of scruples against the death penalty. The important fact is that veniremen were arbitrarily excluded by reason of their abstract beliefs as to capital punishment. These beliefs cannot fairly be termed "prejudice," and are unrelated to the veniremen's ability to be fair to the parties.

The high percentage of scrupled veniremen aggravates, but does not create, the constitutional violation. It is therefore erroneous for the State's Attorney to argue that if petitioner's argument is accepted, "legal procedure will change and must change as the polls change." (Brief, p. 26.) Arbitrary exclusion of any identifiable class, however small, is unconstitutional. Thus, Negroes may not be excluded from juries in suburban communities where few Negroes reside, nor can Jews be excluded from jury service in rural Southern communities simply because few Jews live there. Accordingly, the public opinion polls serve chiefly to demonstrate the extent and seriousness of the exclusionary procedure in question here which prohibited almost every second prospective juror from serving in murder cases in which the state qualified the jury for the death penalty.

(10)

Scrupled Veniremen Can Fairly Adjudge the Innocence-Guilt Issue.

To meet petitioner's contention that scrupled persons should not be excluded on the innocence-guilt phase of the trial, respondents and *amicus* take the position that scrupled persons cannot be fair to the state on the question of the defendant's innocence or guilt. Thus, the Attorney General of California states (Brief p. 20):

> ". . . The state or federal governments can reasonably conclude, we submit, that despite any protestations to the contrary, a person scrupled against the death penalty cannot objectively judge the issue of guilt when he knows that a finding of guilt would permit a judge or another jury to impose a sentence of death. . . ."

See also the Illinois Attorney General's brief page 17, and the State's Attorney's brief pages 40 to 41.

There is absolutely no basis for these assertions. They are based upon pure speculation and conjecture. Compare *United States* v. *Wood*, 299 U.S. 123, 149 (1936). *Not one question was asked of any stricken venireman as to whether his views on capital punishment might affect his verdict on the primary innocence-guilt issue.*

The same contention was made and rejected in *Crawford* v. *Bounds*, wherein Judge Winter said (Op. 28-29, App. A. 26-27):

> "The exclusion of all persons from the jury in a capital case who hold conscientious objections to capital punishment cannot be justified on the ground that it is necessary for the effectuation of the interest of an accused and the interest of society in having a fair and impartial jury determine the guilt or innocence of the accused on the facts as presented to

them, and who are not influenced in their judgment by extraneous beliefs regarding one of the possible punishments which might be imposed. There, of course, can be no doubt as to the legitimacy of this interest. But it can be served by the exclusion of a much narrower group than that which was excluded in the instant case—the exclusion of only those whose beliefs would impair their impartiality in determining guilt aside from the question of punishment. It is precisely for this reason that the *voir dire* inquiry should not cease after a determination that the prospective juror is opposed to capital punishment, but should further ascertain whether this opposition would preclude him from making a fair determination on the issue of guilt.

"If a prospective juror's conscientious objection to one of the forms of punishment which the statute allows are so severe as to render him unable to participate, with an open mind, in the jury's deliberations on the culpability of the accused, he is properly challengeable—and should be challenged—for cause. He has demonstrated that he is not an impartial, "indifferent" juror. On the other hand, if a prospective juror with conscientious objections can, in spite of these objections, make an impartial determination on the issue of guilt, his exclusion, if the class to which he belongs become substantial, works to deny to the defendant his right to have his case judged by a jury representative of the community without serving any recognizable, legitimate interest of the state. Objections to capital punishment may be based on many different stages of belief, and involve subtle nuances of conscience. The function of *voir dire* should be to explore these nuances to determine whether the prospective juror would be able to participate fairly in the deliberations on the issue of guilt, confining his judgment to the facts as presented. Under the equal protection clause, *voir dire* cannot be a blunt instrument of systematic exclusion of a widespread segment of the community whose views do not interfere with the interest which the state seeks to protect."

The state which established the single-trial double-issue procedure may not exclude for cause persons scrupled on the penalty issue, because it thereby excluded a substantial segment of the community (here 49%) who, so far as the record here shows, could be fair to both sides on the threshold innocence-guilt issue. *If the states persist in the desire to exclude scrupled persons on the penalty issue, they must either separate that issue from innocence or guilt, or demonstrate explicitly that the scruples will cause bias on the innocence-guilt issue.* Otherwise, the jury which determines the defendant's innocence or guilt is stripped of the substantial segment of the community, such as the 25 million persons represented by the religious-affiliated amici, whose only possible bias is on the penalty issue.

(11)

Petitioner Has Standing To Raise The Scrupled Juror Exclusion Issue.

Repeatedly throughout their briefs, respondents state that the question of excluding scrupled jurors was not raised at trial. It should be noted, however, that petitioner made a pre-trial motion to remove the question of punishment from the jury which tried the issue of innocence or guilt. (R. 70-71.) Furthermore, the Supreme Court of Illinois considered the merits of the scrupled jurors exclusion issue. *Witherspoon* v. *Illinois,* 36 Ill. 2d 471, 475-476 (1967). In *Raley* v. *Ohio,* 360 U.S. 423, 436 (1959), this Court said:

> "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."

(12)

This Court Can and Should Take Cognizance of the Scientific Studies of Professors Zeisel, Wilson and Goldberg.

Respondents attack the adequacy of the studies cited by petitioner to demonstrate that death-qualified juries are prosecution-prone. (St. Atty. pp. 28-37; A.G. Ill. pp. 21-25.) Respondents offer no studies whose findings are in opposition to those offered by petitioner, but rather seek to disparage and criticize the manner in which the tests were performed. They conclude that it is impossible to generalize about people with conscientious scruples against the death penalty without conducting a thorough battery of psychological tests on each prospective juror.

Apart from the effect of conscientious scruples or lack thereof on individual jurors, the studies cited do show conclusively and unanimously that a jury from which all scrupled persons are eliminated is likely to be substantially more partial to the prosecution on the innocence-guilt issue than a jury from which such persons are not excluded. The studies show that the *average* non-scrupled person favors the prosecution more than the average scrupled person.

Each of the scholars cited by petitioner and respondents agree that death-qualified jurors, when confronted with the same factual situation, are more likely than scrupled jurors to return a verdict of guilty and to impose a harsher sentence, and are less likely to accept a defense of insanity. These results are in accord with the everyday experience of practicing attorneys. This is undoubtedly why, for ex-

ample, the *Madden* prosecutor qualified the jury for the death penalty but did not ask for a death verdict.

Respondents seek to minimize the weight of the scientific studies. Thus, the State's Attorney states (Brief p. 30):

> "The fundamental defect of the . . . studies . . . is their total lack of relation to the legal standard of impartiality."

It is difficult to come to grips with this criticism since the State's Attorney does not see fit to explain what he believes the proper "legal standard of impartiality" to be, nor how the studies should have related to that standard. But in any event, the scientist's office is to present the evidence from which lawyers and judges can determine the legal consequences. It cannot be doubted that these studies establish that non-scrupled jurors tend to think in ways that may fairly be characterized as partial to the prosecution. It is for this Court, not Professors Zeisel,* Goldberg and Wilson, to determine how these attitudes relate to the legal standard of impartiality.

The State's Attorney argues that the number of persons interviewed by Professors Goldberg and Wilson is "incredibly small," and he questions whether college students are representative of prospective jurors selected from the entire adult community. (Brief, p. 28.) The first contention demonstrates a lack of knowledge of scientific sampling

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* Professor Hans Zeisel is co-author with Professor Harry Kalven of "The American Jury" (1966), cited by this Court in *United States* v. *Jackson*, 36 Law Week 4277, 4278, fn. 8 (April 8, 1968).

procedures. The important factor is the quality of the sample, not its size. As to the second argument, the State's Attorney does not explain why college students would be expected to respond differently from others having similar views concerning the death penalty.

The State's Attorney faults the studies because the subjects were not exposed to "actual testimony or even to transcript of testimony" and because no instructions were given "concerning the elements of offenses, the presumption of innocence, and burden of proof beyond a reasonable doubt." (Brief p. 29.) The answer is that such trappings are unnecessary to a scientific determination of the attitudes of the subjects. It is not necessary to provide a make-believe courtroom scene in order to probe the beliefs and attitudes of the persons interviewed. Based upon the results of scientific probing, reliable predictions may be made as to the performance of the persons interviewed and other members of the community when they are actually called for jury duty.

The State's Attorney argues that "a test designed to show how an individual reacts to a case without the benefit of group discussion is deficient." (Brief p. 29.) We are well aware that, as the State's Attorney says, "a verdict is the result of collective judgment processes in which the individual jurors consult, debate, exchange viewpoints, change judgments and opinions in order to reach their verdict . . . " (Brief p. 29.) Indeed, the fundamental objection to Section 743 is that it stultifies in advance this crucial opinion exchange and leavening process — what the State's Attorney aptly calls "the dynamics of jury deliberation"— but this process is not necessary to ascertain the attitudes of persons called for jury service, which is all that the scientists set out to do.

The State's Attorney further questions the Goldberg and Wilson studies because the percentage differences between scrupled and non-scrupled jurors "are not high." (Brief p. 29.) This statement overlooks the basic statistical theory applicable in studies such as these. The question is not whether the studies produce large numbers but whether the results are, in the language of the statistician, "statistically significant." The importance of this concept is recognized by both the Illinois Attorney General (Brief pp. 21-22) and the amicus Legal Defense Fund (Fund Brief p. 56). There is no doubt that the central finding—that persons who have no scruples against imposing the death penalty are more likely to find the defendant guilty—is based on statistically significant results. In fact, the results stand unchallenged.

The studies on which petitioner relies bear out the common sense reaction to the question presented. Respondents have failed to produce any valid criticism of these studies. Under such circumstances, there is no valid reason for this Court not to rely on these impartial, scientific studies.

It should be borne in mind that these studies are relevant to only one of the numerous constitutional objections to the jury selection procedure in question here. The rationale of the *Crawford* decision, for example, avoids the need to consider these studies.

(13)

The Impact of This Case Is Limited To Jury Selection Procedures In Capital Cases.

Respondents and the California Attorney General contend that adoption of petitioner's theory will revolutionize and wreak havoc upon *voir dire* practices in a vast number of cases, civil as well as criminal. (St. Atty. pp. 44 to 56; A.G. Ill. pp. 33 to 35; A.G. Calif. pp. 9 to 13.)

These exaggerated, *in terrorem* arguments probably need no response before this Court. A decision favorable to petitioner here need affect only criminal cases in which the prosecution seeks the death penalty. Such a decision would not deprive trial courts of power to exclude for cause veniremen who are shown to be biased against one of the parties. In the hypothetical civil rights prosecutions suggested by respondents (A.G. Calif. pp. 12-13; St. Atty. pp. 53-54), persons who are opposed to civil rights workers or who deem them inferior are clearly subject to challenge for cause.

Petitioner's contention is precisely that no bias was established to justify exclusion for cause of the 47 veniremen excused pursuant to Section 743, because:

First, the superficial questioning of almost all of the excluded veniremen was inadequate to disclose any ground of bias on the penalty issue (Petitioner's opening brief, Part I, pp. 13 to 38), and

Second, even assuming *arguendo* that bias on the penalty issue was shown, no showing of bias was made as to the innocence-guilt issue, and petitioner was entitled to have persons scrupled as to the death penalty serve on his jury to try the question of his innocence or guilt, because they were not shown to be biased on that question. Their exclusion for cause constituted a systematic and arbitrary exclusion of an identifiable segment of the community, and the exclusion system operated to empanel a jury which was likely to be prosecution-prone. (Petitioner's opening brief, Part II, pp. 38 to 43).

(14).

The Issues In The Case Are Ripe For Adjudication.

Petitioner agrees with the Attorney General of Illinois that the issues presented in this case are ripe for adjudication, without further evidentiary hearings. (A.G. Ill. pp. 10-11.) It is indeed difficult for us to comprehend why the amicus Legal Defense Fund argues otherwise,* since the scientific studies cited in petitioner's opening brief (pp. 28 to 32) reach the very same conclusions as those predicted by the Fund in its planned survey. And the Fund concedes that there are grounds upon which this case may be disposed of in petitioner's favor regardless of the Court's views as to the adequacy of the sociological data. (Fund Brief, pp. 51-53.)

Thus, the rationale of the majority in *Crawford* v. *Bounds,* discussed above in Part (1), is entirely independent of these scientific studies.

Petitioner has submitted several contentions to this Court which do not involve the sociological studies, namely:

(1) Section 743 is invalid on its face because it authorizes exclusion for cause without an adequate showing of bias, thus violating petitioner's rights under Due Process and Equal Protection Clauses. (Petitioner's opening Brief, Part I A, pp. 13-16.)

(2) The inadequate *voir dire* questioning led to the mass exclusion of scrupled veniremen without any showing that they could not be fair to the state on the penalty

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* Petitioner consented to the Fund appearing as amicus upon the understanding (later proven to be erroneous) that the Fund concurred in petitioner's position that the issue on which certiorari was granted may properly be adjudicated on the record before this Court.

issue. This irrational exclusion of qualified persons violated petitioner's rights under the Due Process and Equal Protection Clauses. (Brief Part I B, pp. 17-28.)

(3) Even if the scrupled veniremen were biased on the penalty issue, they could be fair on the question of innocence or guilt, and petitioner was entitled to have them qualified to serve on the jury which determined that question. (Brief Part II, pp. 38-43.)

(4) Through the operation of Section 743, petitioner was deprived of his rights under the Equal Protection Clause because the determination as to whether his jury would be stripped of scrupled persons depended on the prosecutor's whim, and because the statute created arbitrary and unreasonable classifications as to the cases in which scrupled persons could be removed for cause. (Brief Part I B (3), p. 22, and Part II A, p. 39.)

(5) The operation of Section 743 discouraged exercise the right to trial by jury. Compare *U. S.* v. *Jackson*, 36 Law Week 4277 (April 8, 1968).

None of the foregoing contentions is related to or dependent upon the sociological studies.

The Fund suggests the Court should remand the case in order to broaden the issues presented, and to consider the scrupled juror exclusion question in conjunction with other constitutional issues. (Brief, pp. 22-30.) But this suggestion flies in the teeth of the settled principle that this Court disposes of cases on the issues before it and then only on the narrowest possible grounds. There is simply no need or occasion for this Court to solicit the introduction of issues not now before the Court. It is best for those issues to come here and be presented when they are ripe for decision in the normal course of litigation. Surely this Court's heavy work load does not lend itself to seeking out extraneous and novel issues.

Since the correctness of the conclusions reached in the scientific studies relied on by petitioner is not challenged by the Fund, there is no reason to require repetitive material to bolster those conclusions. This Court has remanded cases presenting issues of legislative facts only when the record before the Court contained nothing from which the Court could make the needed findings of facts. In *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543 (1924), cited by the Fund at page 71, this Court remanded for a determination of whether the wartime emergency had ended since the only evidence offered on this question had been the statement—of which the Court took judicial notice—that the supply of rental housing in Washington, D.C., exceeded the demand. Similarly in *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194 (1934) (Fund Brief p. 71), the case was remanded because not only was there no evidence with respect to the local milk trade in New York, the regulation of which was brought into question, but also because the allegations in the pleadings did not even suggest the status of the trade. The post-conviction cases cited by the Fund at page 75 are all inapposite; those cases arose on motions to dismiss, and this Court remanded for determination of the facts of the cases.

In the present case the adjudicative facts are agreed. There is no question as to what happened at the *voir dire;* the pleadings in the courts below alluded to the question raised; the Supreme Court of Illinois ruled on the issue; and this Court has before it impartial scientific studies fully supporting petitioner's argument as to the attitudes of scrupled and non-scrupled persons, and the pernicious effect on petitioner's rights by reason of the wholesale exclusion for cause of scrupled veniremen.

Accordingly, no sound purpose will be served by remanding this case for further hearings. This would simply postpone unnecessarily the resolution of an important constitutional issue which is fully and actually presented on the record in this case, and which was disposed of on the merits by the Supreme Court of Illinois.

(15)

Any Rule of Constitutional Law Announced In This Case Should Be Given Full Retroactive Application.

The Attorney General of California contends that if the issues are decided favorably to petitioner, the decision should be given prospective application only, that is, to cases in which the trial commences after the date of this Court's opinion. (Brief, Part II, pp. 25-35.)*

Several *amici* have written in favor of full retroactive application (Bailey Brief, Part II, pp. 7-10; Madden Brief, Part III, pp. 29-33), or to cases in which the death penalty was imposed. (Fund Brief, Part IV, pp. 85-93.)

While it is unnecessary to petitioner's position to consider the general issue of retroactivity (see Part (16) below), we nevertheless think it appropriate that we express our views on that question.

The constitutional guarantees in criminal cases to which retroactive application has been denied are:

(1) The defendant's right to exclusion of evidence seized in violation of the Fourth Amendment. *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

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* The Attorney General suggests also that this Court apply the rule to Mr. Bumper in No. 1016, but not to petitioner in this case, citing *Stovall* v. *Denno*, 388 U.S. 293 (1967). We discuss this issue in Part (16) below.

(2) The defendant's right to be free from comment on his failure to testify. *Tehan ex rel. Shott* v. *United States,* 382 U.S. 406 (1966).

(3) The accused's right to warnings by the police of the constitutional rights to remain silent and to the assistance of counsel. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

(4) The accused's right to counsel during pre-trial confrontation for identification purposes. *Stovall* v. *Denno,* 388 U.S. 293 (1967).

Several newly announced constitutional rights, including Sixth Amendment rights, have been given retroactive effect, including:

(1) The defendant's right to assistance of counsel at all critical stages of the prosecution. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Doughty* v. *Maxwell,* 376 U.S. 202 (1964); *Burgett* v. *Texas,* 88 Sup. Ct. 258 (1967).

(2) The defendant's right of confrontation and cross examination as outlined in *Pointer* v. *Texas,* 380 U.S. 400 (1965). *Brookhart* v. *Janis,* 384 U.S. 1 (1966); *Specht* v. *Patterson,* 386 U.S. 605 (1967).

(3) The responsibility of the state to furnish trial transcripts to indigents on appeal. *Eskridge* v. *Washington Prison Board,* 357 U.S. 214 (1958).

(4) The right to exclusion of coerced confessions. *McNerlin* v. *Denno,* 378 U.S. 575 (1964).

(5) The defendant's right to assistance of counsel on appeal. *Anders* v. *California,* 386 U.S. 738 (1967); *Smith* v. *Arizona,* 389 U.S. 10 (1967).

The language of the decision of the Fourth Circuit Court of Appeals in *Crawford* clearly indicates that the Court there considered that its decision would be applied retroactively. *Crawford,* like this case, arose on collateral attack.

It is unthinkable that a contrary result could be reached in any case where a denial of equal protection of the law is discerned. This Court has never failed to give retrospective effect to a decision finding a denial of equal protection. The reason is probably found in the proposition, recognized in all the retroactivity decisions, that if a constitutionally defective practice affects the basic fairness of the defendant's trial, it must be given retroactive effect. The concept that all citizens are entitled to equal protection of the laws when faced with criminal prosecutions is so deeply seated in our basic concepts of fairness in the administration of criminal justice that to say that a practice denies equal protection is synonymous with saying that it affects the basic fairness of the defendant's trial. Judge Sobeloff put it in a somewhat different way when he said in *Crawford* (Op. 7, App. A p. 36):

> "I read due process as being the broader guarantee of fundamental fairness. For this reason, I cannot envision a mode of jury selection involving an infraction of equal protection that might possibly satisfy the demand of due process."

Judge Sobeloff believes that this case falls within that area where equal protection and due process coalesce (Op. 6, App. A p. 35), and that the opinion should be grounded upon both the Due Process Clause and the Equal Protection Clause, but regardless of which analysis is adopted here, it is clear that exclusion of a substantial class of persons from petitioner's venire because of their views on the penalty question, without determining whether those views

would affect their impartiality on the innocence-guilt issue denied petitioner equal protection of the laws and thus violated fundamental notions of fairness applicable to the trial of criminal cases. The decision should, therefore, be applied retroactively. The effect of retroactive application, however, can be quite limited. As demonstrated in petitioner's opening brief, Appendix 2, many states, by statute or decision, require that jurors' views on the penalty issue be shown to affect their impartiality on the innocence-guilt issue before a challenge for cause will be allowed. This Court may well limit its holding to cases in which no such connection was established in the *voir dire*.

We now turn to consideration of the three criteria set out in *Stovall* for determining whether or not new rules of constitutional law should be applied retroactively in criminal cases (388 U.S. at 297):

(a) *The purpose to be served by the new standards.*

In *Stovall,* this Court pointed out that "We have also retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial." (388 U.S. at 298.) In the case at bar, the make-up of the jury is involved. The constitutional defect goes to the heart of the fact-finding process because it involves the identity and collective attitudes of the finders of fact. That is why in *Crawford* Judge Sobeloff states (Opinion pp. 2-3, App. A. p. 32):

> "The underlying idea in all of the jury selection cases relied upon in the major opinion is that the fairness of the trial was impaired by the deliberate empaneling of a jury not truly representative of a cross-section of the community. To my mind, this is essentially a due process concept expressing the Constitution's interdiction of invidious discrimination in the

method of jury selection. *See Smith* v. *State of Texas,* 311 U.S. 128, 130 (1940). The inherent objection to the exclusion of prospective jurors on account of race, sex, religion, philosophic belief or economic condition is that it opens the way to a fact finder's partiality, bias and unfairness, which are often difficult to demonstrate in a particular case. These exclusions go to 'the very integrity of the fact-finding process' [citing *Linkletter* v. *Walker,* 381 U.S. 618, 639 (1965)] which depends on the presence of an impartial jury truly representative of a cross-section of the community. If this basic condition of representativeness is violated due process is denied; and such an exclusion has been held reversible error without a showing of prejudice in the particular case. *See Labat* v. *Bennett,* 365 F.2d 698, 723 (5th Cir. 1966). If a venire list has been so manipulated as to become unrepresentative, it cannot be defended as measuring up to minimum constitutional standards of due process. After all, due process is simply the legal expression denoting fairness, and we are agreed that making the selection from an unrepresentative list is not fair."

In *Glasser* v. *United States,* 315 U.S. 60, 85 (1941), this Court said:

> "Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial."

In *In re Murchison,* 349 U.S. 133, 136 (1955), this Court condemned any practice which might raise questions as to the impartiality of a judge as fact-finder, stating:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

Every defendant in a criminal case is entitled to a trier of fact who will carefully weigh and scrupulously balance every item of proof. To eliminate arbitrarily from this fact-finding body an identifiable segment of otherwise qualified citizens affords the opportunity unfairly to tailor a particular jury to the desires of one side or the other. Where, as here, the basis for exclusion is the expression of scruples against the death penalty, the state is given a clear and unfair advantage over the defendant. Whether the remaining jurors in any particular case are entirely impartial cannot be known. But we do know, based upon the polls and studies cited in petitioner's opening brief, that a jury from which all scrupled persons have been excluded is far from representative of the entire community and is likely to be composed of persons who are inclined in favor of the prosecution. Such a jury cannot help but distort the fact-finding process. The impanelling of such juries presents a clear danger of convicting the innocent and of the imposition of harsher sentences on the guilty.

(b) *The extent of the reliance by law enforcement authorities on the old standards.*

The Attorney General of California recognizes that this Court has never sanctioned the practice of excluding scrupled jurors for cause as against the constitutional arguments presented in this case. (Brief p. 29.) This Court's only prior ruling on this practice is *Logan* v. *U.S.*, 144 U.S. 263 (1892) (discussed in petitioner's opening brief at pages 36 and 37), but in that case no constitutional arguments were presented to or ruled upon by the Court. Accordingly, unlike most of the non-retroactivity cases cited above, it cannot be said that the states have relied on any sanction by this Court of the constitutional validity of the practice of excluding scrupled jurors for cause.

The California Attorney General contends there was reliance because "The federal courts of appeals have repeatedly and recently upheld the practices. [Citing cases.]" (Brief p. 28.) But with the exception of the 1954 decision of the Second Circuit Court of Appeals in *U.S.* v. *Puff*, 211 F. 2d 171 (2d Cir. 1954), *cert. denied*, 347 U.S. 963, all of those cases were decided *after* petitioner was tried in 1960. This Court and only this Court is the final arbiter of issues of federal constitutional law. There simply was no authoritative body of federal law on the constitutional issues involved here at the time of petitioner's trial.

Prior to the *Puff* decision, several state courts of last resort held that the existence of scruples against the death penalty was *not* sufficient to justify the state's challenge for cause. (Petitioner's opening brief, p. 15, fn.; *State* v. *Lee*, 91 Iowa 499, 60 N.W. 119 (1894); *State* v. *Garrington*, 11 S.D. 178, 76 N.W. 326 (1898).) Many other state reviewing courts had sanctioned the challenge for cause only when the prosecution demonstrated that the scruples would affect the veniremen's verdict. (See Annot. at 48 A.L.R. 2d 560, 574 to 576.) Furthermore, most state statutes on the subject require a showing of nexus between scruples and verdict. (Appendix 2 to Petitioner's opening brief.) Only five states—Illinois, Georgia, Louisiana, Alabama and Texas—have enacted laws which permit exclusion for cause on the basis of scruples alone, unconnected to the effect they may have on the verdict (although in practice the statutory requirements have not always been observed).

In light of these facts, it cannot fairly be said that Illinois relied on decisional law upholding its practice of automatic exclusion of scrupled veniremen without demonstrating that their scruples would affect their ability to be fair to the state on the issue of innocence or guilt, or even on the penalty issue.

(c) *The effect on the administration of justice of a retroactive application of the new standards.*

The Attorney General of California argues that the effect of retroactive application "would be chaotic." (Brief p. 29.)

Petitioner suggests that the effect of retroactive application will depend upon the ground of the Court's ruling:

—If the Court holds that Section 743 on its face violates the Equal Protection Clause because it applies in murder cases but not in other cases in which the death penalty may be imposed (as argued in petitioner's opening brief at pp. 22 and 39-40), the effect of the decision will be quite narrow. The decision will be applicable only to Illinois, and there, applicable only to cases tried prior to January 1, 1964 when Section 743 was repealed. All of the other state statutes dealing with *voir dire* examination respecting scruples apply to all capital cases, not just to one kind of capital case (murder) as in Illinois. (See Appendix 2 to petitioner's opening brief, pp. 45-55.)

—If the Court holds that Section 743 violates the Equal Protection Clause because it vests an unfettered discretion in the prosecutor to determine the make-up of juries in capital cases (as argued in petitioner's opening brief at pp. 22 and 39-40), the decision will have a wider effect because it will apply to all capital cases except perhaps those in which death is a mandatory penalty.

—If the constitutional infirmity relates to the failure to demonstrate that the scruples would prevent veniremen from being fair to the state on the penalty question (as argued in Part I A of petitioner's opening brief, pp. 13-16), the number of cases affected will probably be relatively small, since most states by statute and court decision require the showing of such a nexus as a condition prece-

dent to the state's challenge for cause. (See Annot. at 48 A.L.R.2d 560, 581 to 585, and statutes set out in petitioner's opening brief, Appendix 2; pp. 47, 50-55.*)

—If the constitutional infirmity relates to the failure to demonstrate that the scruples would prevent veniremen from being fair to the state on the innocence-guilt issue (as argued in Part II of petitioner's opening brief, pp. 38-42, and as held by the majority of the Fourth Circuit Court of Appeals in the *Crawford* case, Appendix A to this brief), a greater number of cases would be affected. But here again the number would be restricted because many states by statute and court decision require the showing of such a nexus as a condition precedent to the state's challenge for cause. (See statutes set forth in Appendix 2 to petitioner's opening brief, pp. 47-50, and the cases are found in the annotation at 48 A.L.R. 2d 560 *et seq.*)

—If the Court holds that the operation of Section 743 unlawfully discourages criminal defendants from exercising their right to trial by jury (as argued in Part (2) above pursuant to this Court's opinion in *United States* v. *Jackson*, 36 Law Week 4277 (1968)), the decision will apply to all states in which this form of *voir dire* interrogation is permitted. However, this Court may hold that a ruling on this basis is applicable only in cases in which the state failed to establish a nexus between scruples and the verdict.

—If the Court should decide the case on the ground that death-qualified juries are prone to the prosecution

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* We wish to call the Court's attention to the following Maryland statute which should be added to Appendix 2 of petitioner's opening brief:

> "Hereafter no person shall be disqualified for service as a juror of this State by reason of his beliefs against capital punishment."
>
> MD. CODE ANN. Art. 51 § 8 A (Supp. 1967).

(as argued in petitioner's opening brief in Part I C and D and II A, pp. 28-36 and 38-40, a view adopted by Judge Craven in the *Crawford* case, App. A pp. 37-38), the Court again may limit its ruling to cases where no nexus was established between the scruples and the verdict on the innocence-guilt issue.

It is, of course, impossible to gauge in advance the precise effect of any of these possible rulings. But the states have no justifiable interest in convicting the innocent, or in overriding the defendant's right to a fair trial on all issues merely to secure a verdict of death. We therefore submit that a right sense of justice argues for full retroactive application regardless of the decision's effect on other cases.

In the event this Court determines that the rule should not be given full retroactive effect, we submit the rule should be applied retroactively to those, such as petitioner, who have been sentenced to death. Surely infliction of the ultimate penalty should not be sanctioned when one-half of the community was arbitrarily excluded from the juries which imposed those penalties, and the remaining jurors do not represent a fair cross section of the community and have been shown to be prone to the prosecution on the issue of penalty as well as on the issue of innocence or guilt.

(16)

Even If the Court Applies the Ruling In This Case Prospectively, Petitioner Should Be Afforded the Benefit of the Rule.

Since petitioner's case is one of the two in which this Court has undertaken to decide the important constitutional questions involved here relating to *voir dire* examination in capital cases, he should be afforded the bene-

fit of a favorable decision, even if the Court decides to apply the rule prospectively. As this Court said in *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967):

> ". . . we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making."

We respectfully disagree with the ruling that Stovall was not entitled to the benefit of the new rule announced in the *Wade-Gilbert* cases. (388 U.S. 218 and 263 (1967).) Certiorari was granted in *Stovall* one week after *Gilbert* and over three months before *Wade*. (384 U.S. 985, 1000; 385 U.S. 811.) The cases were argued and decided together. The only distinction between the two cases was that *Wade* and *Gilbert* came before the Court in certiorari from a direct state court appeal, whereas *Stovall* came on certiorari from a federal court habeas corpus proceeding after exhausting state remedies. We suggest that this distinction is immaterial with respect to the question whether *Stovall* should have been granted the benefit of the new rule.*

There is nothing in any of the Stovall opinions which articulates a reason why this Court declined to grant Stovall the benefit of the new rule. Rather, having concluded that the *Wade-Gilbert* rule should not be made retroactive (388 U.S. at 300), the Court asserted that the benefit of the rule would be afforded to *Wade* and *Gilbert* as "the parties in the case in which [the new rule] is

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* Mr. Justice Walter V. Schaefer of the Supreme Court of Illinois said concerning *Linkletter* v. *Walker*, 381 U.S. 618 (1965):

> ". . . the Court makes retroactivity turn upon whether a particular judgment is being reviewed upon direct appeal or on collateral attack, a matter that is totally unrelated to reliance upon the former legal doctrine." Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 N.Y.U. L.Rev. 631, 644-45 (1967).

announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue." (388 U.S. at 301), without explaining why, by the force of the Court's reasoning, Stovall was not likewise deemed to be a party to the case in which the new rule was announced and therefore "a chance beneficiary" of the new rule.

Even if petitioner's case was taken by the Court for the purpose of determining the issue of retroactivity, any rule announced may be held to be retroactive and nevertheless applied to petitioner without violating the principle that a "case or controversy" is a prerequisite to adjudication. When, as in *Stovall,* the Court adjudicates a new constitutional rule and the issue of retroactive application at the same time, there is no reason or policy which precludes granting the benefit of the rule to every litigant whose case is then before the Court.

There is no equitable consideration which should impel the Court to distinguish among the litigants whose cases serve as the vehicle to adjudication of a new rule of constitutional law. Every party whose case is involved, including those whose cases are before the Court on "collateral" review, should be treated alike. Parties on "collateral" review, just as parties before the Court on certiorari from direct appeal, have evolved "concrete cases or controversies" and have utilized "the incentive of counsel to advance contentions requiring a change in the law." (388 U.S. at 301.) These "policies of decision-making" are just as applicable to petitioner's case as to Bumper's, and it is completely immaterial that petitioner is here on certiorari from collateral review while *Bumper* comes before the Court on certiorari from direct review. Application of the rule to Bumper and not to petitioner will serve to

demean the precious right of habeas corpus, the importance of which has often been recognized by this Court.

Accordingly, even if this Court determines that a rule of constitutional law announced in this case should be given prospective effect only, petitioner in this case should receive the benefit of that rule.

(17)

Considering the Totality Of Circumstances Surrounding the Selection Of Petitioner's Jury, Petitioner Was Denied Equal Protection and Fundamental Due Process.

Even if this Court should decide that one or more of petitioner's specific constitutional arguments is valid but that petitioner himself is to be denied the benefit of the decision, there remains, as this Court held in *Stovall*, the question of whether petitioner was deprived of the fundamental right to a fair trial before an impartial tribunal under the Due Process Clause. We submit that he was.

If this Court finds, as we urgently suggest, that the wholesale elimination of scrupled jurors results in leaving a prosecution prone venire from which the jury is to be selected, there can be no doubt that defendant's fundamental due process rights were violated. Regardless of whether the jury which actually tried petitioner was in fact prosecution prone, the right to trial before an impartial tribunal is so fundamental that even hint or possibility of partiality results in a violation of fundamental concepts of due process. Indeed, we believe that even if the Court limits its holding to finding that the arbitrary and systematic exclusion of a substantial class of juries violates the Constitution, without reaching prosecution prone issue, the Court should find a violation of fundamental due process, for where the make-up of the fact

finding tribunal is concerned every improper practice which creates even the possibility of affecting the fairness of the tribunal is abhorrent to basic concepts of justice. As this Court said in *In re Murchison*, 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.' *Tumey* v. *State of Ohio*, 273 U.S. 510, 532."

Of course, if the Court adopts the equal protection analysis of *Crawford* the decision will certainly be applied retroactively, as indicated above, but the same result is also reached by applying the "fundamental due process" test, for as Judge Sobeloff points out in *Crawford* (Op. p. 7, App. A. p. 36):

> " . . . I cannot envision a mode of jury selection involving an infraction of equal protection that might possibly satisfy the demand of due process."

Apart from any individual ground for decision of the issues in this case, however, the totality of circumstances surely shows a violation of fundamental due process. Forty-seven jurors, or 49% of those questioned were excused for their views on the death penalty. They were not asked a single question as to whether their views on the penalty

would affect their impartiality on the guilt issue, and were not even asked whether their scruples would prohibit their considering the death penalty if instructed to do so. On the other hand, the state was permitted to extract a solemn pledge from virtually every remaining juror that he would vote for the death penalty rather than any other in the nebulous and undefined "proper case." Under these facts, a violation of basic concepts of fairness in the trial of criminal, and especially capital cases, seems apparent.

At the very least, the empaneling of a jury from which every person who expresses any opposition to the death penalty has been removed, leaving only jurors who favor the penalty to decide the *penalty* issue, where a wide range of penalties are to be considered, surely violates fundamental principles of fairness in the penalty fixing phase of the trial, to which the Due Process Clause applies. On this extremely narrow ground petitioner's case must at least be remanded for resentencing before a fair tribunal.

Respectfully submitted,

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